

SECOND SESSION

Friday, April 25, 1941, 10 o'clock a.m.

The meeting was called to order at 10:05 o'clock a.m., Mr. Jesse S. Reeves, Vice-President of the Society, presiding.

Chairman REEVES. Will the meeting please come to order?

The Chair is required to obey the mandate of the Executive Council, which is to the effect that he should read these two resolutions:

Principal papers and addresses may not exceed twenty minutes in delivery and informal papers or discussions may not exceed ten minutes for each speaker.

The presiding officer is required to call for the next speaker at the expiration of the time allotted.

The three papers this morning attack more or less a common problem. It is not the business of the Chairman to anticipate, but to plunge at once into the middle of things. Therefore, I shall ask Professor Frederick S. Dunn, of Yale University, to read the first paper on the program.

THE INTERNATIONAL RIGHTS OF INDIVIDUALS

BY FREDERICK S. DUNN

Professor of International Relations, Yale University

Mr. Chairman, Ladies and Gentlemen: International law, we are told, is a law between states, and individuals have no rights and no personality thereunder. In my view, this particular legal fossil is highly misleading and in large degree false, and its continued hold on the minds of many people explains in part why international law is held in such ill repute by laymen today.

Now this remnant of legal animism can be taken in two ways: either it is a factual description of the nature and scope of the body of rules of international law, or else it is a prescriptive statement setting forth what should be the proper pattern of a system of orderly relations between nations. In my opinion it is defective on both counts.

Let us consider it first as a description of current reality. What it purports to say is that the rules of international law are primarily concerned with the relations of states as political units, and that these units are irreducible atoms, beneath the surface of which international law does not seek to penetrate. In other words, international law is not directly concerned with the rights and interests of private individuals, and if they benefit by the operation of its rules, they do so, not as subjects, with legal personalities, but as "objects" of international law. The layman can be pardoned if

this suggests to his mind the analogous situation of an "object" of charity who is the beneficiary of a hand-out, but who has no legal claim to its continuance.

Fortunately, this is not an accurate description of the real scope and operation of the rules of international law. From the beginning, those rules have been in fact much more concerned with fulfilling the needs and interests of men in society than with advancing the political fortunes of sovereign states. The very basis on which international law was erected was the universal moral order of the Christian Church, which in turn rested solidly on the concept of the worth and dignity of the individual. Later on, when utilitarian philosophies provided the theoretical foundation for the international legal structure, the values incorporated in the rules of international law were still centered upon the individual. In the nineteenth century, international law became the handmaiden of free enterprise and the guardian of the conditions which made possible the successful operation of capitalism on a world-wide basis.

Thus, the rules governing matters of jurisdiction, which, as you know, make up a very large part of the body of rules of international law, served primarily to overcome the difficulties created for private trade and intercourse by the fact that the legal authority of modern states was limited to their respective territories. Again, the whole body of the law of diplomatic protection of citizens abroad was essentially concerned with the advancement of the rights and interests of private citizens as against governments. Even the laws of war were not designed to aid sovereign states in carrying on war against each other, but were primarily for the purpose of safeguarding individuals against the excesses of state action. Likewise, the rules governing neutral rights and duties were in large part intended to enable the people in neutral countries to carry on economic and social contacts during a war with the least possible interference from belligerent states.

If we turn to the written international law as contained in treaties and conventions, we find much the same story. Only a relatively small proportion of the treaties entered into since the middle of the last century have dealt with the relations of states as political atoms. The great majority of them have been concerned with the rights and interests of private individuals and were designed to enable governments to serve those interests better. The subject-matter of these treaties has dealt in large part with the simple activities of the man on the street, his ability to travel about freely from country to country, to carry on trade across national boundaries with some degree of predictability, to be assured of satisfactory means of communication with any part of the world, to be protected in matters of public health and morals and a host of other things which are not at all concerned with the advancement of the political interests of states.

It is not even true that individuals have been powerless to take steps to protect their interests under international law. The great majority of

legal questions disposed of in diplomatic negotiations are raised in the first place by individuals and carried on in their behalf. Even the cases that go before international tribunals are, for the most part, in fact if not in form, initiated by individuals and carried on for their benefit. The fact that such cases are presented in the name of the state and the private claimant appears only in parenthesis is of little practical consequence. Everybody knows that the private citizen is the real party in interest and any monies recovered almost always go directly to him.

The proposition that the state is the ultimate unit of international law has been truer perhaps in the procedural field than anywhere else, but even here there have been many developments which it is very difficult to reconcile with the concept of the unitary state. For example, it is a necessary deduction from this concept that states can have relations with each other only through a single channel. For if a state had two or more mouthpieces, there would be a danger that they might say different things at the same time, and hence the theoretical unity of the state would be destroyed. However, this unitary concept is frequently departed from in practice. Thus in the United States, practically every department of government is involved in some manner in the handling of questions of foreign affairs, and some of them maintain direct contact with the corresponding departments of other governments. A similar development had proceeded very far in Europe before the present war, and it was even possible to find examples of actual treaties being negotiated and carried out by departments other than foreign offices. This may seem like a mere matter of form, but in fact it is quite revealing as to the subject-matter of modern international relations. For only the foreign office and the war and navy departments are charged with the protection of the interests of the state as a political unit. The other departments of government are primarily concerned with the everyday affairs of men in society.

Another revealing procedural development along this line is found in the inroads that have been made in recent years on the unanimity principle of voting in international conferences. In some international organizations, voting power is not based on the concept of the state as the irreducible unit, but upon the extent of the interest of the people in the various countries in the subject-matter dealt with by the organization. Other international institutions, such as the Universal Postal Union, are in fact collectivities not of sovereign states but of local administrative units. In an institution such as the International Labor Organization, where representation is given to different economic groups within each nation, the concept of the state as an irreducible atom ceases to have much meaning.

We must conclude that, as a description of reality, the unitary concept of the state is notably inaccurate. At best it merely describes how international lawyers talk and not how governments behave.

To give personality to the state rather than to the individual is perhaps

a harmless bit of anthropomorphism in normal times, but in the present crisis there is great danger that it will be misunderstood. It suggests a cold indifference to the interests and welfare of the man on the street and is apt to arouse in him an equal indifference to the status of international law. For the official, it gravely overemphasizes the importance of the political relations of states at the expense of the activities of men as human beings.

If this concept is unsatisfactory as a description of reality, does it serve any better as an ideal pattern of what a system of international law should be like? The answer again seems to be in the negative. It is generally agreed that the weakest part of international law has been the rules which have attempted to regulate the relations of states as political units. Such rules have never been effective *by themselves* in restraining the actions of states. As Dr. Gerhart Niemeyer has clearly shown in his recent provocative book, *Law Without Force*, international law as a law between sovereign states can work only if it rests firmly upon a system of values separate from those associated with the existence of the state as a political unit. Otherwise, the state becomes an end in itself and its main concern will inevitably be the protection and enhancement of its power position. Under these circumstances it is idle to suppose that the self-denying rules which states can sometimes be induced to accept when their security is not in danger will stand in the way of any action deemed necessary when the power position of the state is believed to be threatened.

The times in which international law has achieved its greatest successes have been those in which it has been in obvious harmony with the system of values held by the most important classes in the leading nations of the world. In the early days, international law got a foothold because it incorporated the moral values of Christianity and these values were persuasive to the strongest elements in the community of nations. It likewise managed to survive in the eighteenth and nineteenth centuries because it served directly the values held by the commercial and industrial classes, which had become the most powerful groups in the political life of the leading nations.

International law is losing its effectiveness today, partly because at the moment there is no predominant system of values prevalent over a great part of the international community, and partly because it has been getting out of touch with the interests and activities of men in society. It will continue to lose effectiveness until it again takes on meaning in terms of the real interests and values of those who ultimately determine the political actions of nations.

Now I am well aware that it is not possible to draw a sharp line between the interests of men in society and the interests of sovereign states as political units. In fact, the individual himself seldom draws this distinction. In times of crisis he is deeply concerned about the political fortunes of his state in its relations with other political units, and he will usually be quite willing to yield up his own interests—even his interest in life itself—in order that the

power and security of his state may be preserved. But the fact remains that men in society do have interests which extend across national boundaries, and it is these interests which make up in large part the real content of international relations. International lawyers should take note of this fact and should not build their system around a concept that is not today, and never has been, a good description of the world of international events.

The technological revolution has forced in all countries a reconsideration of the whole rôle of government in relation to the economic and social welfare of the people, and has brought about a very rapid extension of the functions and powers of government everywhere. The size and strength of this movement clearly indicate that we have come to one of the major turning points of history. Yet it would be an egregious error to suppose that this necessarily marks a permanent trend away from concern for individual rights and toward emphasis on the political interest of states.

In the past few days we have heard many definitions of democracy. The essence of them all, it seems to me, is deference for the individual, respect for him as a human being. This includes the right to be consulted in regard to matters affecting his welfare, since consultation is one of the best ways of showing deference to him. So long as governmental powers are exercised on behalf of the individual and he has a voice in determining how they shall be exercised, we still can have democracy, no matter how many specific new functions the government exercises or even how strong the central authority may be. Hence it would be very unwise to conclude that the same extension of governmental powers, which is observable at present in all countries, both totalitarian and democratic, is an indication of the final triumph of the interests of the state over those of the individual. On the contrary, where the extension of functions is for the specific purpose of protecting the individual from the economic and social hazards associated with modern technology, it works in favor of democracy rather than against it.

If international law is to survive the present crisis and regain its former influence, it must be in harmony with this major social development. For unless it has the active and willing support of the influential classes of the community, it is powerless to limit the actions of governments. This support cannot be obtained merely through moral exhortation. It will come only because of a widespread conviction that international law is a useful device to aid governments in fulfilling those functions which enable men to pursue their activities with mutual profit and security.

Chairman REEVES. The plan for this morning's session is that at the conclusion of each of the three papers, there will be a period for questions to be propounded to the speaker by those who have been selected to lead the discussion. At the conclusion of the reading of the third paper, with questions, then discussion upon any of the three papers will be opened to the floor.

Those who have been selected to lead the discussion, Mr. Freeman, Mr. Turlington, and Mr. Cowles, are now at liberty to ask Professor Dunn questions with reference to this paper.

MR. ALWYN V. FREEMAN. There is one aspect of the problem discussed by Professor Dunn which it would do well to consider for the purpose of clarification. Professor Dunn has been at great pains to show us how the rules of international law are primarily concerned with individuals, rather than with the composite units which we know as states. But while it may be admitted that international law can and indeed sometimes does confer rights directly upon individuals, this does not signify that general international law in fact does so at the present time. Thus the so-called international rights of individuals have a legal basis solely in so far as they relate to *foreign* nationals, to the subjects of a given foreign state. To say international law protects the rights of individuals *quâ* individuals is not only just half the story, but it is an erroneous statement of the law. For the link that gives individuals the benefit of international law is the link of nationality, and it is his *foreign* nationality that does this.

Citizenship within a given state does not *ipso facto* confer rights on the citizen against that state under international law. On the contrary, the relationship involved is one of purely domestic concern. Since this is so, it follows that a state does not necessarily commit an international wrong by inflicting injury upon a *heimatlos*, nor upon a member of its own nationality.

One may call the whole conception of the state a fiction, if you will, an abstract metaphysical concept, an unreality hypostatized into a convenient descriptive symbol; but the link of nationality that unites an individual to that fiction is itself no fiction. It is of the essence of international law as developed by state practice. And that practice is clear, that without the link of nationality, an individual is without the protection of general international law.

The Permanent Court of International Justice again recognized this in the recent Panevezys-Saldutiskis Railway case. Talking about the right to insure, in the person of its nationals, respect for the rules of international law, the court declared that "*This right (of a state) is necessarily limited to intervention on behalf of its own nationals*, because, in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection." In that case the Estonian nation made some attempt to discredit this rule of international law, and even to deny its existence, but after examining the precedents, the court arrived at the conclusion that these were cases in which the governments concerned had agreed to waive strict application of the rule.

I frankly fail to see much useful purpose in affirming that international law is fundamentally concerned with individuals, that individuals are endowed with certain fundamental, human rights, in the face of a well estab-